U.S. Department of Labor

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Issue Date: 13 March 2006

CASE NO.: 2005-LHC-779

OWCP NO.: 07-171367

IN THE MATTER OF

LOUIS J. PELLEGRIN
Claimant,

v.

TETRA APPLIED TECHNOLOGIES, INC.,
Employer

and

AMERICA HOME/AIG,
Carrier

APPEARANCES:

HOWARD MARCELLO, ESQ.
On behalf of Claimant

CHRISTOPHER L. ZAUNBRECHER, ESQ.
On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Louis J. Pellegrin

(Claimant) against Tetra Applied Technologies, Inc. (Employer), and American Home/AIG (Carrier). The formal hearing was conducted in Covington, Louisiana on January 18, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-11, and Employer's Exhibits 3, 4, 6-19, and 23-25. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of alleged injured/accident is July 2, 2004;
2. Whether the injury was in the course and scope of employment is disputed.
3. An employer/employee relationship existed at the time of the alleged accident.
4. The date the employer was advised of the injury is disputed.
5. Notice of Controversion was filed November 22, 2004.
6. An informal conference was held.
7. The average weekly wage at the time of injury was $708.53.
8. Nature and extent of disability is disputed:
    (a) Temporary total disability is disputed;
    (b) Temporary partial disability is disputed; and
    (c) Permanent total benefits are disputed.
9. No benefits have been paid.
10. Medical benefits of $91.00 have been paid.
11. Date of maximum medical improvement is disputed.

[1] The parties were granted time post hearing to file briefs. Briefs were due by February 13, 2006. Claimant's counsel did not file a brief.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Issues

The unresolved issues in this proceeding are:

1. Whether Claimant had a work related accident as described in the claim;
2. Whether Claimant was injured at his house when a pipe fell from overhead and hit him on his neck and right shoulder;
3. Whether the medical expenses are related to or made necessary by a work related accident;
4. Existence, extent, and duration of disability;
5. Necessity of further medical treatment;
6. Whether Claimant had a subsequent accident after leaving Employer, in which Claimant injured his neck and shoulder; and
7. Maximum medical improvement.

Statement of the Evidence

Louis J. Pellegrin

Claimant testified that he is 26 years old. Most of Claimant's work experience has involved heavy manual labor.

Claimant was first employed by Employer in March 2000 as a roustabout. Shortly thereafter Claimant was moved up to a floor hand or roughneck. Claimant quit working for Employer when he did not get the increased pay that he stated he was entitled to as a floor hand. He had various jobs in the interim which included working for Cajun Cutters from August 2003 to October 2003 and employment with Worldwide Blasting and Painting. In March 2004 Claimant was again hired by Employer as a floor hand. (EX 23).

Claimant was asked if he had had any prior injuries (prior to the accident/injury in question) while working for Employer. At first Claimant said no, but then when his memory was refreshed by his counsel, Claimant recalled that on about two occasions pipes had hit him on the hand and injured him. One of these occasions occurred about a month or two prior to the July 2, 2004 accident. Claimant explained that on this particular occasion when his hand got hit by the pipe, an Employer supervisor, Sherman James, looked at Claimant's hand and told Claimant "You're going to be alright, quit being a baby and go back to work." (Tr. 19). No accident report was filed for the injury. Claimant was asked whether accident reports were ever talked about by Employer. He responded, "They just

don't like it, if somebody got hurt because they said, 'It's a small rig, the way it is that it sits on the platform, if we get too many, you know, accident reports filled out it's going to raise up our accident things and ya'll ain't going to have any job and the rig will be stacked.'" (Tr. 20).

The July 2, 2004 accident

Claimant explained that he was working on the rig floor when the accident occurred. Claimant and James Mitchell, an Employer driller, were on the drill floor taking off the TIW valve. Claimant was holding the bottom of the valve and Mitchell was holding the top of the valve. When they lifted the valve, Mitchell's hand slipped off the top of the valve and the valve fell on Claimant's right shoulder; Claimant went down on one knee and hit his hand on the ground. At some point Mitchell wrote a statement (it is undated) which was admitted into evidence and reads as follows: "Louis Pellegrin was complaining of back ache from the first day of the week, when we backed out the TIW valve it may have fell over a little harder than usual, he said he wasn't hurt, he continued to work the rest of the week, and seem to be fine." (CX 11). Claimant stated that he did not fill out any paperwork regarding the accident because he was told it was "a big headache." (Tr. 25). Claimant testified that after the incident with the valve, he continued working the rest of the day and was latching elevators and pipe; after a while his shoulder started bothering him. He stated that he mentioned the pain to his co-workers, and they made jokes about it. That night Claimant took some ibuprofen and went to sleep.

Claimant first sought medical treatment for his injury on July 12, 2004. Claimant stated that he noticed a sharp pain in his arm when he went to lift a diaper bag for one of his children. Claimant's pain continued to worsen, so that on July 12, 2004 he sought medical treatment at Houma Urgent Care (hereinafter HUC). Claimant stated that he told the attendant at HUC that a valve had fallen on him. HUC took x-rays, and told Claimant to take a week off of work; Claimant stated that he was also told that he needed to see a physician[3]. The Doctor at HUC told Claimant that the injury could be a pinched nerve, a rotary cuff injury, or a third condition that Claimant could not remember.

Before attempting to go back to work for Employer, and about three weeks after the July 2, 2004 accident, Claimant saw the company doctor, Dr. Dantin. Claimant stated that Sid, the individual that did the hiring for Employer, sent him

[3] On Cross Examination Claimant clarified that it was at a second visit to HUC, on July 29, 2004, that Claimant saw Dr. Goldbard, who told Claimant that he might need to see a specialist/orthopedic.

to Dr. Dantin. Dr. Dantin told Claimant that he could return to work. Claimant returned to work for about two days, but his injury was still bothering him[4]. Claimant told Sid and John, who worked for Employer, that his injury was still bothering him. Claimant stated that Sid and John told him to stay at home for the weekend and rotate heat and ice and to take ibuprofen. Sid took Claimant to Rite Aid and bought him an icepack, heating pad, and bottle of ibuprofen. Claimant stated that he was told he would be paid through the weekend. Claimant also recalled being told, "Be here Monday morning and we'll have a meeting with everybody from the rig." (Tr. 30).

Claimant stated that on Monday morning he showed up at work and was told to wait in a conference room. He was then told that Employer was not going to pay for anymore of his medical bills; he would have to pay for everything himself. According to Claimant he was told that he had seen the company doctor and that the doctor said he was fine to go back to work. Claimant recalled Employer telling him to call when he was feeling better and was ready to go back to work.

After this meeting with Employer, Claimant attempted to see Dr. Casey at Houma Orthopedic Clinic. The first time he went to the clinic Claimant told the secretary that he was there regarding a work-related injury. He was then told that he would have to first file his claim under worker's compensation and not under his own insurance. Claimant stated that he also called about three or four other doctors and was told by all of them that the claim would have to be filed under worker's compensation and not under his individual insurance policy. Anxious for treatment, Claimant stated that it was after this that he made up a story about something falling on his arm at home so that he could see a doctor for his injury. Claimant was eventually examined by Dr. Casey, who ordered an MRI and EMG. Claimant testified that he was also treated by Dr. Michael Haydel, an anesthesiologist, at the Pain Specialty Center. Over a period of two to three months Dr. Haydel gave Claimant three steroid injection shots in his neck[5]. Claimant was under the belief that his medical insurance[6] was paying for these procedures and office visits. Claimant testified that after the three injections he had a follow-up appointment; however, when he arrived at the doctor's office he was told that his insurance card was no good because his insurance had been

[4] During the few days that Claimant did return to work he explained that he worked cleaning up the rig. He stated that he had to scrub the floor with a brush and he could feel the pain in his shoulder. He also noted that he had a hard time sleeping because his shoulder would bother him.

[5] These steroid injections were administered on August 23, 2004, September 7, 2004 and September 14, 2004.

[6] Claimant had medical insurance through Employer.

cancelled. He could not afford to pay the fee for the visit, so he left without getting seen. Claimant explained that he did eventually receive a letter from the insurance company stating that his insurance had been cancelled. Claimant called the insurance company and was told that Employer had terminated him, thus canceling his insurance. Claimant stated that he never received any notice from Employer regarding his termination or the cancellation of his insurance policy.

Sometime between July 2004 and March 2005, Claimant stated that he also sought medical treatment at Chabert Medical Hospital. Claimant waited to be seen at Chabert Medical Hospital; however, he was told that the hospital did not have the equipment or the doctors necessary to treat him. Claimant ended up going to Terrebonne General. Claimant was seeking medical treatment at these various emergency rooms in Houma, Louisiana because he did not have the money or medical insurance to pay for a regular doctor's visit.

Claimant next testified regarding CX 8 which includes a summary of the medical bills Claimant is alleging were related to the injury at issue in this case. The bills are as follows:

- Houma Urgent Care - $580.00
- Physician Surgery Specialty Hospital (where Dr. Haydel was giving Claimant steroid injections) - $5,613.79
- Dr. Haydel's fee bill - $3,985.00
- Cowen Rehabilitation Center, for conducting the EMG - $840.00
- A bill for an unstated amount from Michael Butler, the emergency room physician at Chabert Memorial.
- Dr. James Hyatt, a Chabert emergency room physician - $92.00
- Chabert Medical Center - $77.00
- Prescription drug fees - $37.07
- Houma Orthopedic Clinic - $1,880.00

Claimant also testified that none of these bills have been paid and that as of the day of his hearing he owed the entire amount.

Claimant explained that after the accident his shoulder caused him pain and he had trouble sleeping. After about six months he started to feel somewhat better, but Claimant stated that his shoulder was still bothering him when he went back to work in February of 2005. Claimant explained that he went back to work "because he was losing everything." (Tr. 44). Claimant was being evicted, he had lost a car, services were being disconnected, and his family had had to get food stamps.

Claimant stated that his first job after the injury at Employer was with Preferred Contract. He next went to work for Performance Energy and in March 2005 he sought medical treatment at Terrebonne General because he had an incident while at work. Claimant explained that he was working offshore and had to climb some radiators when his right shoulder locked up on him; he could not complete his job and went home. Claimant stated that he took a reemployment physical before going back to work for Performance Energy which included x-rays and an exam by a physician. The physician was of the opinion that Claimant was fit and able to go back to work. Claimant stated that he told the doctor he was able to go back to work.

On cross examination Claimant testified that in 2001 he filed a worker's compensation claim for a back injury that occurred while working for Pride Offshore. This incident occurred on January 12, 2001. (EX 25). Claimant explained that he injured his back when he and another worker were maneuvering pipe. The other worker was not holding the tagline correctly and the pipe was spinning, pulling Claimant with it and he fell and pulled his lower back. Claimant sought medical treatment for this injury at Terrebonne General Medical Center on the same day as the accident. (EX 15). Claimant was diagnosed with a back spasm. Claimant did not recall whether or not he had sought additional medical treatment for this injury. Employer's counsel pointed out that on January 18, 2001 Claimant saw Dr. Kinnard for pain in the lumbar region, shoulder, groin, and left thigh. (EX 8)[7]. He was prescribed Soma and Celebrex. (EX 8). Employer's counsel also pointed out that about a month after the accident Claimant again went to see Dr. Kinnard complaining of constant back and neck pain. (EX 8)[8]. Claimant still did not recall this doctor's visit. Claimant did not return to work for Pride Offshore after his injury; he was fired for failing to report back to work. (EX 25).

Claimant explained that the reason he waited 10 days to seek medical attention, after the accident at issue in this case, was because over that time period the pain increased. Claimant was first seen by Dr. Goldbard at HUC. Claimant stated that he told Dr. Goldbard that he hurt himself at work. Dr. Goldbard's record, EX 11, states, "Chief Complaint: Complains of right shoulder pain for one

[7] The medical records from this incident indicate that Dr. Kinnard diagnosed Claimant with a lumbosacral strain which he felt would improve with time and continued conservative management.

[8] At this visit with Dr. Kinnard, Claimant was complaining of neck pain and headaches. X-rays were normal and Dr. Kinnard noted that he thought the patient had complaints that he thought were somewhat out of proportion to the reported incident. Dr. Kinnard recommended that Claimant continue to see the chiropractor; he had nothing else to offer at that time.

week. Patient states works offshore but can't pinpoint any specific incident." Claimant stated that he did not know why that was in the medical report.

Claimant was asked what his duties were when he went back to work for Employer for the few days after Dr. Dantin saw him. He explained that he was there to clean up the rig – scrub it with a scrub brush and soap. Claimant was asked if this was considered light duty and replied that Employer did not have light duty. Claimant also acknowledged that cleaning up the rig for Employer was easier than the work he had been doing since February 2005 (after the injury).

Claimant testified that he did not voluntarily stop working for Employer. He explained that he received a doctor's release from Dr. Casey saying not to go to work until further notice. Claimant admitted that prior to this he had stopped working; however he said that was because Employer had told him to come back to work when he was feeling better.

Employer's counsel asked Claimant if Dr. Casey had refused to treat him because his injury was a worker's compensation injury. Claimant explained that he was not refused treatment; however, it was his understanding that if he said he had a worker's compensation injury, then the doctor's office would have to file the claim under worker's compensation, and since Tetra was denying him any medical payments, he did not think he could get seen.

Claimant was asked if Dr. Casey had ever specifically diagnosed what was wrong with him. Claimant could not remember the word, but said it started with a "c" and was written in his papers. Dr. Casey told Claimant that the test results had come back normal. The MRI report (EX 7) stated that Claimant had a possible spondylosis C3-4, 6-7 compressive disc herniation, and the EMG NCS (EX 12) was normal. On August 12, 2004 Dr. Casey told Claimant that he did not need any type of surgery or any further treatment other than pain medication; he also told Claimant about the steroid injections.

Claimant was questioned regarding his job application with Performance Energy. On his application Claimant listed Cajun Cutters as a place of previous employment; the dates he put down for working there were August 2004 to December 2004. Claimant explained that the dates were not accurate. He stated, "They tell me to put dates down and I just put some dates down." (Tr. 88). Claimant was uncertain as to what dates he actually did work for Cajun Cutters.

Claimant also acknowledged that on his pre-employment medical questionnaire he stated that he had no back injury, no neck injury, no rotary cuff injury, no shoulder injury and no permanent impairment. Claimant explained that he does that on all of his job applications because if he tells them that he is injured or that he cannot perform the job duties, then he will not get hired.

Claimant's counsel stipulated that Claimant reached maximum medical improvement February 1, 2005, and is not seeking compensation or medical benefits beyond this time. (Tr. 11, 99, 100, 103). Employer's counsel asked Claimant about the duties he performed as a rigger-blaster at Performance Energy. Claimant admitted that his work at Performance Energy was about the same level of difficulty as his work cleaning up the rig for Employer. However, Claimant pointed out that the job at Performance Energy was almost a year after his injury; when he was working for Employer it was immediately after the injury and he was still going through treatment. Claimant stated that he would have stayed and continued to work for Employer if they had given the time off that he needed, but instead Claimant stated that Employer did not want to pay him and did not want to send him to any doctors.

Medical Evidence

Bret E. Casey, M.D. (EX 19)

Dr. Casey testified by deposition. He stated that he has been employed as a staff member at Terrebonne General and as an employee of Houma Orthopedic Clinic since August 2004. Dr. Casey has passed his first step of the boards and will be board certified after two consecutive years of practice and upon completing the final step of his boards.

Dr. Casey first saw Claimant on August 3, 2004. Claimant told Dr. Casey that he was injured while working around his house when a pipe fell from an overhead work area and hit him in the neck and right shoulder. Dr. Casey's notes from questioning claimant read as follows: "Pipe fell on patient, hit in right shoulder one month ago. No work since. Numbness, tingling with pain in neck, arm, shoulder. Pain from shoulder blade to arm. Questionable headaches. Questionable weakness." (EX. 7).

Claimant told Dr. Casey that the accident occurred on July 3, 2004. Dr. Casey stated that when he first saw claimant, claimant indicated that he had pain in his neck that radiated down into the medial aspect of his forearm and into his ring and small finger, as well as occasional numbness and tingling. Dr. Casey tested

claimant's range of motion and found that he had excellent range of motion in his shoulder. Dr. Casey read his entire physical examination report of August 3, 2004 into the record. He summarized the results of his examination by explaining, "Well, it's not normal. He [Claimant] has positive Tinel's in his ulnar nerve. He has some mild weakness in finger abduction and finger flexion. It's not horribly abnormal, but it's definitely not normal." Dr. Casey assessed claimant with possible ulnar neuritis. He explained that ulnar neuritis is numbness and tingling in all the nerve distributions. He also thought that claimant might have a cervical disc impingement, based on the numbness and anatomic distribution, as well as the history of the accident, and recommended an MRI and an EMG (nerve conduction study). Dr. Casey requested that claimant schedule another visit with him after the studies were completed.

The MRI was conducted on August 6, 2004. The Radiologist's report stated that there was general mild arthritis of the neck with bone spurs. When asked whether that was a normal MRI reading for a person of claimant's age, Dr. Casey explained that the report showed a little more degenerative change than he would expect in a person that age[9]. However, Dr. Casey noted that there was nothing in the MRI to indicate that Claimant had suffered any sort of traumatic injury to his neck or shoulder which resulted in some sort of neurological problem.

The EMG was conducted on August 12, 2004. Dr. Casey received a copy of the results, which were normal, accompanied by a letter from Dr. Cowen, who performed the test. Dr. Casey stated that according to the EMG it would be fair to say that there was no electrodiagnostic evidence of any injury to either the cervical structures or the ulnar nerve; however, Dr. Casey explained that the EMG could produce a false negative – meaning that the test result is negative even though symptoms do exist.

Dr. Casey next saw Claimant on August 12, 2004. At this visit Claimant told Dr. Casey that his injuries actually occurred on the job. In Dr. Casey's August 12, 2004 report he indicated that the MRI and EMG showed no significant findings, with the exception of some mild spondylosis (arthritis) and that there was no nerve root encroachment or evidence of nerve injury. At this visit Claimant told Dr. Casey that the numbness and tingling in his fingers had resolved, but that he was suffering from occipital headaches that were really the debilitating problem.

[9] Later in his deposition Dr. Casey notes that the spurs and spondylosis shown on the MRI are indicative of a chronic event, not an acute event. However, Dr. Casey did agree that Claimant's situation could be one where he had the chronic condition, but it did not bother him until a trauma occurred.

Dr. Casey diagnosed Claimant with lower brachial plexus neuropraxia[10] (injury to the nerves); per Claimant's report that the numbness and tingling had subsided, Dr. Casey reported that the neuropraxia had resolved as of the August 12, 2004 visit. Dr. Casey explained that as for the headaches, he was unable to determine when they would resolve.

Dr. Casey stated that Claimant had excellent strength during his exam and this would lead him to believe that there was nothing wrong with Claimant's shoulder.

Dr. Casey did not recall whether or not he had restricted Claimant from working after the August 12, 2004 visit. He did not circle any work status on his medical report[11], and generally, if he does not circle any status, then he does not restrict the patient's work. However, he could not guarantee that that was what he had told Claimant.

Dr. Gary Goldbard, Urgent Care of Houma (EX 11, CX 2)

Claimant saw Dr. Goldbard at Urgent Care of Houma on July 12, 2004. Dr. Goldbard's report states that Claimant complained of Upper Extremity Problems and an injury that was possibly work related. Dr. Goldbard diagnosed Claimant with possible shoulder sprain, rotator cuff injury, and/or radiculitis cervical (radiating neck pain). He recommended that Claimant avoid any strenuous activity, elevate his leg/arm, use a sling, apply moist warm packs, and see an orthopedic MD in office for re-check and follow up. Dr. Goldbard told Claimant to return to the clinic if he was not distinctly better in two days and/or not completely better in 10 days.

Dr. Kirk A. Dantin, Houma Family Practice Clinic (EX 6, CX 1)

Dr. Dantin examined Claimant on July 19, 2004. The "History" section of Dr. Dantin's medical report states that a TIW fell on Claimant's right shoulder on July 3, 2004. Dr. Dantin diagnosed Claimant with a contusion of the right shoulder that had improved since his Urgent Care Visit of July 12, 2004. Dr. Dantin's report says that Claimant rated his pain as a three out of ten. Dr. Dantin did not take any x-rays, but he did note that the tests he performed on Claimant were

[10] Dr. Casey testified that a brachial plexus neuropraxia was probably what had caused the numbness in Claimant's hand. This injury would manifest itself at the root of the neck, which is not an area examined by the MRI. Dr. Casey stated that all of the cases of this injury that he has seen were caused by some type of trauma.

[11] On the billing sheet for the first visit Dr. Casey circled "off work", but on the billing sheet for the second visit he did not circle anything.

negative. Dr. Dantin concluded that Claimant could return to regular duty and should take ibuprofen or aleve if needed, and that Claimant should have a recheck if he had any problems.

Dr. Jegert, Urgent Care of Houma (EX 11, CX 2)

On July 29, 2004 Claimant returned to Urgent Care of Houma and reported that he had continued right neck and back pain which he attributed to lifting at work. Claimant was seen by Dr. Jegert, who reported that Claimant was in no acute distress, no spasms were noted, but there was some tenderness to the right trap shoulder. Dr. Jegert prescribed Relafen and recommended that Claimant either follow up with the company doctor or with an orthopedic.

Open MRI of Louisiana (EX 16)

On August 6, 2004 an MRI was administered on Claimant. Dr. Stephen J. Pomeranz reviewed the results and concluded that there were uncinate spurs and posterior spondylosis from C3-4 through C6-7. There was no canal stenosis or neural foraminal stenosis and no comprehensive disc herniation.

Dr. Todd Cowen, Cowen Clinic for Rehabilitation Medicine (EX 12, CX 5)

Dr. Cowen performed Claimant's EMG test, as recommended by Dr. Casey. Upon examination, Dr. Cowen reported that Claimant had full motion of his shoulder except for abduction which was limited around the last 10-20 degrees. The results of the EMG were normal.

Dr. Michael S. Haydel, Pain Specialty Center (EX 9, CX 4)

Claimant was first seen at the Pain Specialty Center on August 23, 2004 for neck pain and headaches. Claimant told Dr. Haydel that the pain was associated with a work related accident where a valve fell on him. Claimant described his pain as a constant stabbing pain to the back of the neck that shoots into the right shoulder with associated headaches and insomnia; Claimant stated that the pain was made worse with cervical movements and prolonged standing/walking. According to Dr. Haydel's report, Claimant explained that the various medications he had been prescribed by other doctors were not working and had been discontinued. At this initial visit Claimant and Dr. Haydel discussed the risks and benefits of steroid injections. Claimant decided to have the injections which were administered on August 30, 2004, September 7, 2004 and September 14, 2004[12].

[12] The steroid injections were administered at Physicians Surgical Specialty Hospital; the medical records regarding these procedures are contained at CX 3; however, they do not contain any relevant information regarding Claimant's condition or the results from the injections.

Claimant returned to Dr. Haydel's office on September 22, 2004 for an appointment; however, due to insurance issues, Claimant left without being seen.

Leonard J. Chabert Medical Center, Emergency Department Record (EX 14, CE 7)

On October 10, 2004 Claimant went to Chabert Medical Center complaining of right neck and shoulder pain. He was diagnosed with musculoskeletal pain, given a prescription, and told to follow up at Charity Hospital in New Orleans if he was still having problems.

Terrebonne General Medical Center (EX 15)

Claimant's attorney submitted Claimant's entire medical history from Terrebonne General Medical Center. The only records mentioned during the hearing were related to a March 15, 2005 visit, during which Claimant stated that he was suffering from neck pain and right shoulder pain. However, because both Employer's counsel and Claimant's counsel stipulated that no benefits were being sought after February 2005, this medical record is not relevant to the outcome of the case.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he

suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on July 2, 2004 a TIW valve fell on his right shoulder while he was working as a floor hand for Employer. Claimant did not fill out any paperwork regarding the accident; however, another employee, James Mitchell, witnessed the accident and made a statement, (CX 11), which corroborates Claimant's testimony that a TIW valve fell on his shoulder. Dr. Casey, the orthopedic surgeon that examined Claimant diagnosed Claimant as suffering from lower brachial plexus neuropraxia, which Dr. Casey testified is, in his experience, almost always caused by some type of trauma. Based on the foregoing, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on July 2, 2004 in that he has established that he suffered a harm and that working conditions existed which could have caused the harm.

Employer has failed to provide substantial countervailing evidence to rebut this presumption and has failed to show that Claimant's injury is not one arising out of or in the course of his employment.

Although Employer pointed out that Claimant waited 10 days after his injury to seek medical treatment, Claimant explained that over this time period his pain increased and eventually reached a point where he needed to seek treatment to get some relief. Employer also referred to the Houma Urgent Care medical records

(EX 11, CX 2), from Claimant's initial doctor visit for his injury. The intake sheet/nurse's notes state: "Works offshore, but can't pinpoint any specific incident." In contrast, however, the doctor who examined Claimant, Dr. Goldbard, wrote his own report, which states, "Upper Extremity Problems reported. Pain reported. Injury reported possible at work with lifting." Employer also noted that when Claimant initially sought treatment from Dr. Casey, Claimant said that he was injured at his house when a pipe fell from an overhead working area and hit him in the neck and right shoulder. (EX 7, CX 5). Claimant testified that he made this history up because Employer had already told him that it would not pay for any more medical treatment, and the doctor's office said that if he was injured at work, they would have to file his claim under worker's compensation. Accordingly, Claimant testified that he did not think he could get seen if he said he was there for a work-related injury (Tr. 75-80), but the next time Claimant saw Dr. Casey, on August 12, 2004, Claimant explained that he had actually been injured at work. (EX 7, CX 5). Thereafter, Claimant continued to seek medical treatment for a number of months, and he consistently attributed his injury to a work-related accident. Consequently, I accept Claimant's version of why he first told Dr. Casey that his condition was non work-related, and I find that none of Employer's assertions amount to substantial evidence sufficient enough to rebut the Section 20(a) presumption.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties dispute when Claimant reached MMI. Claimant stipulated that he is not seeking any compensation or medical expenses after February 1, 2005, and that MMI was reached as of this date, when Claimant returned to work. Employer on the other hand argues that MMI was reached on July 19, 2004, when the company doctor sent Claimant back to work for Employer.

I agree with the Claimant that MMI was reached as of February 1, 2005, according to his stipulation. Claimant attempted to return to work after seeing the company doctor on July 19, 2004; however, he was still having pain in his shoulder. He told his supervisors that his shoulder was still bothering him and they told him to take the weekend off and come back Monday morning, at which time they told him that Employer was no longer going to pay for his medical expenses, but to come back to work when he was feeling better. Claimant continued to seek medical treatment after July 19, 2004, despite Dr. Dantin's evaluation. Claimant was still having evaluations and procedures done through September 2004, and he only stopped being seen on a regular basis because his insurance was canceled by Employer. After his insurance was canceled Claimant sought medical care at the emergency room because he could not afford to pay for a doctor's office visit, but by February he had returned to work and was no longer seeking medical treatment.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, it has been stipulated that Claimant's disability does not extend beyond February 1, 2005, and I find that Claimant's disability was total in

nature during the period from when he stopped working/stopped getting paid (July 25, 2004) through February 1, 2005, when Claimant returned to work. Claimant's paycheck stub from Employer, which is CX 9, shows a "Period End" date of July 25, 2004. Claimant testified that he thought this was the last paycheck he had received from Employer. (Tr. 21).

Although Dr. Dantin examined Claimant on July 19, 2004 and determined that Claimant could return to his normal duties; he also noted that Claimant should return for a recheck if he had any problems. (EX 6, CX 1). Dr. Dantin only examined Claimant on one occasion and while he found Claimant okay to return to work, Dr. Casey, an orthopedic specialist, examined Claimant after Dr. Dantin, on August 3, 2004, and recommended that Claimant stay "off work". I give Dr. Casey's opinion more weight as he is an orthopedic specialist and can be considered Claimant's treating physician who also made other medical referrals for Claimant.

On August 12, 2004, Dr. Casey again evaluated Claimant; however, he could not recall whether or not he restricted Claimant's work on that occasion. Dr. Casey did not circle any status on his medical report, which normally means that he has not restricted the patient's work. However, Dr. Casey stated that he could not be sure that that is what he told Claimant. At this visit Dr. Casey also referred Claimant to Dr. Haydel to potentially seek steroid injections to relieve his pain. Claimant chose to see Dr. Haydel and receive the injections. Unfortunately, the record is not clear as to whether or not Dr. Haydel would have recommended additional treatment or not because at Claimant's last scheduled visit he was informed that Employer had canceled his insurance and Claimant would have to pay for the visit himself. Claimant was unable to make this payment and had to leave without being examined. After being informed that his insurance had been canceled, Claimant continued to seek medical treatment, at a local emergency room, which indicates that Claimant was still in pain.

Through his testimony and medical records, Claimant has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide)*

Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

The only evidence Employer has offered regarding suitable alternative employment was to show that Claimant was sent back to work by Dr. Dantin. His duties were to clean up the rig – he was not working as a floor hand (the job he was doing when he was allegedly injured), nor, according to Claimant's testimony, was he able to perform the tasks required. Employer's counsel asked Claimant if this was considered light duty and Claimant said no because if a person was hired as a roustabout his duty would be to clean up the rig. (Tr. 70-71). Claimant explained that his duties included scrubbing the rig and picking up trash. (Tr. 70). While Claimant did admit that this work was easier than the job he was doing when he went back to work in February 2005, Claimant explained that in July he had been hurting and was unable to perform the duties of cleaning the rig at that time. There is no other evidence that Employer made other lighter duties available to Claimant. Instead, Claimant was told to go home for the weekend and rest and return on Monday for a meeting. At this meeting, Employer told Claimant that it was not going to pay for his medical expenses, and that he should come back to work when he was feeling better. No other evidence regarding suitable alternative employment has been offered by Employer.

Accordingly, I find that Claimant was temporarily totally disabled from July 25, 2004, the date of his last paycheck, to February 1, 2005, when Claimant

returned to work. Although there was some confusion at the hearing regarding whether or not Claimant worked for Cajun Cutters during this time period, I have resolved this issue in Claimant's favor. Employer's counsel made much of the fact that on Claimant's employment application for Performance Energy he listed Cajun Cutters as a place of previous employment from August 2004 to December 2004. If these dates were accurate, it would end Claimant's compensation claim against employer in August 2004 as opposed to February 2005. However, I do not find this employment application to be accurate. When questioned regarding these dates, Claimant explained that the dates were not correct. (Tr. 88). He stated, "I never know the dates. You can ask everybody I work for. They tell me to put dates down and I just put some dates down." (Tr. 88). Claimant did not know the actual dates that he had worked for Cajun Cutters; however, when Claimant was questioned regarding what he did during the time that he had stopped working for Tetra in July and before going back to work in February, Claimant stated that he would stay at home and baby-sit while his girlfriend was at work; he was also in and out of doctor's offices. (Tr. 45). Further in Claimant's discovery deposition he stated that he thought he worked for Cajun Cutters before he went back to work for Employer in the beginning of 2004. (Pellegrin, Depo. 33). Also in Claimant's deposition he stated that after he stopped working for Employer in July 2004, he was out of work for seven or eight months and during that time period he was receiving medical treatment. (Pellegrin, Depo. 81).

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421;

Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. *See* 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In the present case, Claimant asserts that he should be reimbursed for $13, 251. 86 of medical bills, CX 8, because they were reasonably necessary. I agree. Claimant has submitted a log of his medical expenses that start with his visit to Houma Urgent Care and end with treatment at Chabert Medical Center. On July 12, 2004 Claimant saw Dr. Goldbard at Houma Urgent Care for a "possibly work related injury". Although Employer may not have been aware at this point that Claimant had been injured and was seeking treatment, Houma Urgent Care is an emergency facility and thus this doctor's visit is covered. At this visit, Claimant was told to return to the Clinic if he did not improve.

Claimant next saw Dr. Dantin, the company doctor. At this point Employer was aware that Claimant was asserting a work-related injury. Even if Employer would argue that it was not aware that Claimant would be seeking additional medical treatment, Employer would still be liable for the medical bills because a few days after the appointment with Dr. Dantin, Employer told Claimant that it would not pay for any more medical treatment, thus refusing further medical care.

Claimant did follow-up at Houma Urgent Care on July 29, 2004. At this visit Claimant saw Dr. Jegert who recommended that Claimant see an orthopedic.

Following this advice, Claimant saw Dr. Casey, an orthopedic, who treated Claimant and made a number of referrals, including that Claimant have an MRI, EMG, and see Dr. Haydel for possible steroid injections. All of which Claimant did, and all of which were consistently related to the July 2, 2004 incident that occurred at work. The last medical bill at issue is for Claimant's October 15, 2004 visit to the emergency room at Chabert Medical Center. Although this visit is not directly in the chain of referrals, I find that it should be covered by Employer because Claimant was effectively forced to seek treatment at the emergency room when Employer denied him worker's compensation medical coverage, and subsequently canceled Claimant's medical insurance policy, thus Claimant could not afford to return to Dr. Casey or any of his referrals.

Accordingly, I find that Claimant is entitled to reasonable and necessary medical expenses as summarized in CX 8 for a total of $13,251.86.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, Employer controverted on November 22, 2004. Employer had notice of the injury, at the latest, on July 19, 2004 when Employer sent Claimant to Dr. Dantin, the company doctor. Even if Employer were to argue that Claimant subsequently went back to work as advised by Dr. Dantin, Claimant only worked for a few days before he had to stop because his injury was bothering him. At this point Employer cannot argue that it did not know of Claimant's injury. Employer even had a meeting with Claimant the following Monday to tell him that Employer was not going to pay for any medical treatment. Therefore, Employer did not file a notice of controversion within 14 days of learning of Claimant's injury and is liable for Section 14(e) penalties.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from July 25, 2004 until February 1, 2005, based on an average weekly wage of $708.53;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses incurred between July 2, 2004 and February 1, 2005, resulting from Claimant's injuries of July 2, 2004;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 13th day of March, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge